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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LINO SOLTERO et al.,

Defendants and Appellants.

B260134, B262570

(Los Angeles County Super. Ct. No. BA405056)

APPEAL from judgments of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Lino Soltero.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Gustavo Rengel.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent. A jury convicted Lino Soltero and Gustavo Rengel of two counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)) and, as to each of them, found true a gang enhancement allegation (Pen. Code, § 186.22, subd. (b)(1)(c)). The jury also found true an allegation that Rengel personally used a firearm in the commission of an assault. The court sentenced Soltero to 14 years 8 months in prison and Rengel to 31 years in prison. They appealed, and we consolidated the appeals. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

A. The Assault on Jack Mora

On the evening of November 20, 2012, Jack Mora was walking along City Terrace Drive in Los Angeles to see his girlfriend, Lillian Burgos. Burgos lived in an area claimed by the City Terrace street gang. As Mora arrived outside Burgos's house, Soltero's Mitsubishi Eclipse pulled up to Mora. Rengel, a member of the Metro 13 street gang, got out of the car, pointed a semiautomatic pistol at Mora's face, and said "Fuck City Terrace, Big Hazard." Mora responded, "I ain't from around here. I don't play that." Rengel then walked away.

Burgos came out of her house in response to the commotion. Two women—Lorena Villanueva and Reyanne Rocha—got out of the Eclipse and began yelling at Burgos and heading toward her.²

¹ According to the People's gang expert, Big Hazard is the name of street gang. The expert explained that Rengel may have said "Big Hazard," rather than the name of his gang (Metro 13), in order to mislead the police.

² Rocha and Villanueva were also charged with crimes arising from these incidents. Villanueva pleaded no contest to assault by means of force likely to produce great bodily injury, and she admitted a gang enhancement allegation. Rocha was tried with Rengel and Soltero. She is not a party to this appeal.

Burgos screamed, "No problems." As Mora ran to protect Burgos, the women sprayed Burgos with mace or pepper spray. Rengel and the two women then left in the Eclipse. Mora and Burgos walked to a liquor store, where Burgos called 911 and reported the incident.

B. The Shooting of Justine Molina

During the same evening that Mora and Burgos were assaulted, Justine Molina and her cousin, David Garcia, were inside a Food 4 Less grocery store. Until two weeks earlier, Molina had been in a dating relationship with Rengel that had lasted several years. Throughout their relationship, Molina had been married to an incarcerated member of the El Sereno gang, a rival of Rengel's Metro 13 gang. Garcia was also a member of El Sereno.

While Molina and Garcia were inside the store, Rengel, Soltero, Villaneuva, and Rocha walked in. As they approached Molina in one of the store's aisles, one or more of them made gang signs with their hands. Garcia said, "It's Metro." The two women then hit and kicked Molina, and pulled her hair. Rengel approached Molina with a gun, then grabbed and held her, as Molina tried to push him away. As the two struggled, the gun discharged and a bullet hit Molina's leg or thigh, causing her to fall. Rocha said "Fuck Serotes, fucking bitch, Metro," and continued to hit and kick Molina. (Metro 13 gang members use "Serotes" as a derogatory term for El Sereno gang members.)³

³ At the time of trial, Molina and Rengel had resumed their personal relationship and Molina testified that she did not want anything bad to happen to him. Molina said she panicked after the two women attacked her, and she pulled out a gun that she carried in her purse. When Rengel tried to calm her and get the gun away from her, the gun fired, hitting Molina in her thigh. Garcia,

Soltero, Rengel, and the two female assailants ran out through the front of the store as someone yelled, "Metro." A store manager followed them out of the store and saw them getting into a black Eclipse and drive away. The manager wrote down the car's license plate number. The Eclipse was registered to Soltero.

Later that night, two police officers in a patrol car spotted the Eclipse and followed it. The car stopped suddenly and Rengel got out of the passenger side of the car and ran toward the officers. As he reached at his waistband, he tripped, fell, and dropped a loaded, nine-millimeter semiautomatic handgun. The two women got out of the car and ran away from the officers, but were soon apprehended. Soltero was in the driver's seat of the Eclipse. As he got out of the vehicle, he tripped, and fell to the ground.

C. The Field Showup Identifications

Police brought at least three witnesses of the Food 4 Less incident to the location where the police had detained Rengel, Soltero, and the women. The witnesses identified them as the persons involved in the assault.

The police officers who had responded to Burgos's call about the City Terrace incident drove Mora and Burgos to the location where police had detained Rengel, Soltero, and the two women. Mora identified Rengel as the man who pointed the gun at him and Villanueva as one of the women who attacked Burgos.

Molina's cousin, also testified that Molina, not Rengel, had the gun during the Food 4 Less incident.

⁴ Surveillance video from the store showed Rengel, Soltero, and the two women walking into the store, attacking Molina, and leaving. Because of the poor quality of the recordings, however, the video did not resolve factual issues such as who possessed the gun.

D. Rengel's Jailhouse Calls

Rengel made several calls from jail that were recorded. In one, he said that "Justine" had snitched, and that he had "done nothing but been there for my hood," which a police detective explained meant that Rengel had committed crimes for his gang. In another call, Rengel referred to Soltero as his "crimey," which, the detective said, refers to a person who committed a crime with Rengel. In another call, Rengel wondered aloud if God wanted him "to continue gang banging," and said that he has "just gotta be a G and take it." ("G" is shorthand for gangster.) In another call, in response to the caller telling him "good news" that the Food 4 Less surveillance video did not show that he had the gun or that he shot Molina, Rengel replied, "It don't show me shooting her?" When the caller said that police retrieved two guns, Rengel asked, "How were there two, though?"

E. Gang Expert Testimony

Los Angeles Police Officer Eduardo Mercado testified as the prosecution's gang expert. He followed the Metro 13 gang, among others. Metro 13 claims a territory in the University Hills area of Los Angeles, and marks its territory with gang-identifying graffiti. The gang's rivals are El Sereno Locke Street and City Terrace gangs. Officer Mercado testified about Metro 13's hand signs, monikers, tattoos, graffiti, and their use of insignia of the New York Mets and Michigan State sports teams.

The gang obtains money by selling drugs, "steal[ing] from people," and stealing cars. When asked about the gang's primary activities, Officer Mercado stated that "[t]hey engage in" assault with deadly weapons, narcotic sales, murder, felony vandalism, and theft. He identified two predicate crimes committed by Metro 13 members: James Piggee was convicted of a murder committed in April 2011; and Alejandro Perez was convicted of a robbery

committed in May 2008.

Officer Mercado explained that gang members gain respect among other members of the gang and within the community by committing crimes, or "putting in work." The more serious the crime, the more the gang is feared in the community; and gang members view such fear as respect. Instilling fear in the community benefits the gang because witnesses of gang crimes will not talk to police in order to avoid retaliation from the gang. Fear of "negative consequences" against a "snitch" or "rat" also keeps gang members from cooperating with police.

In response to hypothetical questions based on evidence in the case, Officer Mercado opined that the assaults on Mora and Molina were committed in association with and for the benefit of a criminal street gang.

DISCUSSION

I. Rengel's Counsel's Alleged Conflict of Interest

Rengel contends that his attorney had a conflict of interest that deprived him of his right to the effective assistance of counsel. We disagree.

The following additional facts are relevant. In June 2013, after the preliminary hearing, Rengel retained attorney Carlos Perez. In February 2014, Perez was cited by Bell Gardens Police Department for driving with a suspended license, a misdemeanor, in violation of Vehicle Code section 14601.1, subdivision (a). When Perez failed to appear for a hearing in the case, the court issued a bench warrant for his arrest.

Trial in Rengel's case took place in May 2014. On May 21, 2014, Perez began his closing argument. Before he finished, the court recessed for the day. That evening, Perez was arrested pursuant to the previously issued bench warrant.

On May 22, Perez was held in the county jail and was not present for Rengel's trial. The court postponed the trial until the next day.

On May 23, Perez appeared for Rengel's trial and concluded his closing argument. After the jury began to deliberate, Perez told the court: "I have been in custody for a day and a half in downtown [Los Angeles] County Jail for a [Vehicle Code section] 14601 bench warrant. I would like to also note on the record that it broke my chain of thought and my concentration and I have post-traumatic stress of being in that place, so I would like to put that on the record."

On May 29, 2014, the jury reached its verdicts in the case against Soltero and Rengel.

On June 27, 2014, Perez pleaded no contest to driving without a license. (Veh. Code, § 12500) He was given probation and fined \$240.

On July 31, 2014, the court granted Rengel's request to relieve Perez as his counsel and appointed counsel for him.

On January 22, 2015, Rengel filed a motion for a new trial on the ground that Perez was "operating under a per se conflict of interest during Rengel's trial" that required "automatic reversal." The motion was based in part on *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129 (*Harris*), a decision from this court and division. In denying the motion, the court indicated that it had reviewed one or more appellate decisions that were contrary to *Harris*, but declined to identify them "because they are non-published." The court further stated: "The evidence supporting this conviction was overwhelming. As I weighed whether or not trial counsel could have done anything or in any way might have been less zealous in their representation of Mr. Rengel during the trial because of the minor—what was it, a [Vehicle Code section] 14601 pending matter that he had—the conclusion was easy for the court

to draw, and that conclusion is that there is nothing that the trial counsel could have done or was affected in any way that would have resulted in a different verdict in this particular case."

Rengel contends that the court erred in relying on the unpublished cases and by denying the motion for new trial. He argues that the court was bound by *Harris*, and that *Harris* requires reversal. We disagree.

The right to the assistance of counsel guaranteed by our federal and state constitutions "'includes the right to representation that is free from conflicts of interest."'" (*People v. Friend* (2009) 47 Cal.4th 1, 46 (*Friend*); see also *Wood v. Georgia* (1981) 450 U.S. 261, 271.) A claim that an attorney had a conflict of interest is a category of a claim of ineffective assistance of counsel, which, under *Strickland v. Washington* (1984) 466 U.S. 668, ordinarily requires "a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different." (*People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*).)

"In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest 'that affected counsel's performance—as opposed to a mere theoretical division of loyalties.'" (Doolin, supra, 45 Cal.4th at p. 417, quoting Mickens v. Taylor, supra, 535 U.S. at p. 171) A defendant demonstrates such an effect when "the record shows that counsel "pulled his punches," i.e., failed to represent defendant as vigorously as he might have had there been no conflict.'" (People v. Rundle (2008) 43 Cal.4th 76, 169, disapproved on another ground in Doolin, supra, 45 Cal.4th at p. 421, fn. 22.) This effect may be shown by pointing to a tactically inexplicable failure to assert arguments or take actions that would likely have been asserted or taken by non-conflicted counsel. (Id. at p. 418; Rundle, supra, 43 Cal.4th at p. 170.)

Regarding the second *Strickland* prong, courts have "recognized [that] a presumption of prejudice applies when defense counsel 'actively represented conflicting interests.'" (*Doolin*, *supra*, 45 Cal.4th at p. 418, quoting *Mickens v. Taylor*, *supra*, 535 U.S. 162, 166.) Our state Supreme Court has explained, however, that this presumption of prejudice arises "'[o]nly when the court concludes that the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel.'" (*Friend*, *supra*, 47 Cal.4th at p. 46, quoting *Rundle*, *supra*, 43 Cal.4th at p. 173.)

Here, Rengel makes no attempt to show how the alleged conflict of interest actually affected Perez's performance or to establish either prejudice or the foundation for the presumption of prejudice. Instead, he contends that Perez had "a 'per se' actual conflict" because Rengel and Perez were both "being prosecuted by the same agency," and "that 'prejudice is presumed.'" He relies exclusively on our decision *Harris*.

In *Harris*, Los Angeles Sheriff's Deputy Joshua Busch arrested attorney Gustavo Diaz in February 2012. (*Harris*, *supra*, 225 Cal.App.4th at pp. 1133, 1135.) The Los Angeles County District Attorney filed a felony complaint against Diaz, and Diaz was ultimately held to answer to felony charges of vehicle theft, embezzlement, and taking a vehicle without the owner's consent, and misdemeanor vandalism. (*Id.* at pp. 1133, 1134, & fn. 4.)

In May 2012, Deputy Busch arrested Melvin Harris, and the Los Angeles County District Attorney charged him with possession of a controlled substance. (*Harris*, *supra*, 225 Cal.App.4th at p. 1133.) Harris engaged Diaz to represent him. (*Ibid*.) At Harris's preliminary hearing, Deputy Busch was the sole prosecution witness and was cross-examined by Diaz.

(*Id.* at pp. 1133, 1139.) Diaz did not disclose to Harris or the court that he was the subject of pending felony charges filed by the same office that was prosecuting Harris, or that Deputy Busch had arrested him. (*Id.* at p. 1143.) After the preliminary hearing, Harris was held to answer a charge of possessing a controlled substance for sale. (*Id.* at p. 1133.) When Diaz failed to appear at a pretrial hearing in Harris's case, the court appointed new counsel for Harris. (*Id.* at pp. 1133-1134.)

While Harris was in jail pending trial, Deputy Busch told him that he had previously arrested Diaz. (*Harris*, *supra*, 225 Cal.App.4th at p. 1134.) Harris passed this information on to his attorney, who filed a motion to dismiss the information against Harris on the ground that Diaz had a conflict of interest during his preliminary hearing that deprived Harris of his right to effective assistance of counsel. (*Ibid.*) Although the trial court implicitly concluded that Diaz had a conflict of interest during Harris's preliminary hearing, it denied the motion because dismissal was "'not the appropriate remedy,'" and the error could be corrected by holding a new preliminary hearing. (*Id.* at pp. 1135-1136, 1139.) Harris then sought writ relief in this court. (*Id.* at p. 1136.) We issued a temporary stay of the trial, and ultimately issued a writ of prohibition directing the trial court to dismiss the information against Harris. (*Id.* at p. 1137, fn. 9, 1149.)

We held that the court's implied finding of an actual conflict of interest was "well supported" by the facts. (*Harris*, *supra*, 225 Cal.App.4th at p. 1139.) First, "during Harris's preliminary hearing[,] Diaz faced criminal prosecution by the District Attorney of Los Angeles County, the same entity that was prosecuting his client." (*Ibid.*) As a criminal defendant, Diaz "had an interest in maintaining a cordial and cooperative (if not even subservient) relationship with the district attorney's office—a relationship that might be beneficial to Diaz in achieving a favorable disposition of

the charges facing him"; on the other hand, Diaz's role as Harris's counsel "almost certainly called for a different—perhaps somewhat less conciliatory and more adversarial—relationship with the prosecutor's office." (*Harris*, supra, 225 Cal.App.4th at p. 1139.)

Second, "Diaz had been arrested by Deputy Sheriff Busch, the same officer who had arrested and was testifying against his client." (Harris, supra, 225 Cal.App.4th at p. 1139.) Thus, at the time that Diaz was cross-examining Deputy Busch at Harris's preliminary hearing, Deputy Busch was "a potential witness at Diaz's upcoming preliminary hearing" and "very likely was destined to be a central witness at his trial." (Ibid.) "The fact that Diaz might well be facing [Deputy] Busch again at his own preliminary hearing and trial gives rise to a reasonable concern about Diaz's ability to put aside his own interests and to objectively exercise the judgment required to impeach a witness's testimony without fear of antagonizing the witness." (Id. at pp. 1139-1140.) The situation "could reasonably be thought to exert a conscious or unconscious influence on Diaz's own judgment and conduct in representing Harris's interests." (Id. at p. 1139.)

Contrary to Rengel's assertion, *Harris* does not establish a "per se" rule that an actual conflict of interest exists or that an attorney's deficient performance and prejudice are presumed whenever an attorney representing a criminal defendant is also the subject of charges filed by the same prosecuting agency. Our analysis in *Harris* was focused, initially, on whether the facts in that case supported the trial court's implied finding of a conflict of interest, and we concluded that it did. Specifically, the court's finding was supported by a combination of two sets of facts: (1) facts related to the simultaneous prosecution of Diaz on multiple felony charges and Harris by the same district attorney; *and* (2) the fact that the same arresting officer was an important prosecution witness in both cases. (*Harris*, *supra*, 225 Cal.App.4th at p. 1139.)

Our conclusion in *Harris* must be viewed in light of these facts. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 922 [opinions must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts].) The case does not hold, as Rengel contends, that an attorney has a conflict of interest that precludes effective representation whenever a prosecuting office is simultaneously pursuing unrelated charges against an attorney and the attorney's client. Rather, the conflict in Harris was primarily due to the potential overlapping witnesses. Here, that situation does not exist.

Because *Harris* is factually distinguishable and does not establish the per se rule Rengel asserts, Rengel must still demonstrate that the alleged conflict of interest "affected counsel's performance," (italics added) and was not merely "a mere theoretical division of loyalties." (*Mickens v. Taylor, supra*, 535 U.S. at p. 171.) Rengel, however, offers no argument that Perez's performance was in fact affected by the alleged conflict of interest or that he was actually prejudiced by the conflict. We therefore reject his conflict of interest claim.

Defendant also contends that the trial court, by referring to unpublished decisions, violated the doctrine of stare decisis, which requires that lower courts must follow the decisions of higher courts. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) The court's reliance on unpublished cases, Rengel adds, also violated rule 8.1115(a) of the California Rules of Court, which provides that unpublished decisions "must not be cited or relied on by a court."

Although trial courts are bound by published decisions of appellate courts (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455), a lower court is not bound by case law that is "fairly distinguishable from the facts of the case" in the higher court. (*People v. Triggs* (1973) 8 Cal.3d 884, 890-891.) For the reasons discussed above, *Harris* is fairly distinguishable from the present

case, and the trial court was not, therefore, bound by it. To the extent the court arguably erred by alluding to unpublished cases, the error was harmless. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

II. Rengel's Additional Ineffective Assistance Of Counsel Claims

In addition to his conflict of interest claim, Rengel contends that his trial attorney, Perez, was constitutionally deficient in several respects. For the reasons that follow, we reject these claims.

Rengel asserts that Perez made an ineffective closing argument, which Rengel describes as confusing, lacking a coherent theme, failing to demonstrate a viable defense, and erratic. We have reviewed the closing argument. Perez addressed each count and the gang allegations, pointed out inconsistencies, weaknesses, and credibility problems in the prosecution's evidence in an effort to create a reasonable doubt of guilt, and discussed testimony by Molina and Garcia, which supported the defense theories that Molina, not Rengel, had the gun in the grocery store. We conclude that Perez's closing argument did not fall below the objective standard of reasonableness that is constitutionally required.

Rengel contends that Perez acted unlawfully during voir dire. Specifically, the court found that Perez excused three Asian jurors based upon their race. After the third challenge, the prosecutor objected based upon *People v. Wheeler* (1978) 22 Cal.3d 258, and a codefendant's counsel joined in the objection. The court found that the prosecutor had established a prima facie case that Perez had improperly exercised peremptory challenges, and asked Perez for a response. Perez stated: "I am just doing what is in the best interest of my client. That's all." When he added that he "didn't know that it was improper to—" the court interjected: "Highly improper. Okay?" The court then denied Perez's last peremptory challenge.

Perez's apparent ignorance of the rule against race-based use of peremptory challenges is below an objective standard of reasonableness. Rengel has not, however, established a reasonable probability that, if Perez had understood and abided by that rule, the result of the proceeding would have been different. (See *Strickland v. Washington, supra*, 466 U.S. at pp. 688, 694.)

Rengel also contends that Perez's "lack of familiarity with the law shows a complete absence of a legitimate strategy for the selection of the jury." Although Perez did demonstrate a lack of knowledge regarding race-based peremptory challenges, he has not established how he was prejudiced by that lack of knowledge or how it undermined the integrity of the trial. Also, these challenges, while improper, presumably benefitted Rengel.

Under the heading, "Perez did not adhere to the trial court's schedule" (underlining and boldface omitted), Rengel points to an instance during jury selection, at the beginning of a morning session of court, when Perez arrived 20 minutes late. Perez told the court that he "had a guick pretrial in Norwalk, and then [he] had to run up to Department 33." He apologized for not calling, and explained that his "phone had died." The court admonished Perez, and told him that if he is late again, the court "will conduct a hearing" to impose a \$1,000 monetary sanction against Perez, and that it would inform the State Bar. Rengel also cites to a one-day delay in jury selection when Perez was hospitalized due to an asthma attack and to Perez's absence after his arrest on the bench warrant, discussed above. Even if Perez's one instance of tardiness and his two absences caused him to fall below the applicable standard, our record does not suggest that the result of the proceeding would have been different if Perez had been on time.

Lastly, Rengel refers to statements he made during his sentencing hearing in which he complained about Perez's lack of attention to him, Perez's failure to test the gun for DNA evidence, and Perez's failure to inspect the surveillance cameras at the Food 4 Less grocery store. Rengel's unsworn statements do not constitute evidence of Perez's conduct and the record does not otherwise support them. Even if Rengel's statements are true, the record does not establish a reasonable probability that the result would have been different if Perez had paid more attention to Rengel, had tested the gun for DNA evidence, or inspected the store's surveillance cameras.⁵

III. Substantial Evidence Of Metro 13's Primary Activities

Soltero contends that the prosecution's gang expert's testimony was insufficient to establish the "primary activities" element of the gang enhancement. We disagree.

In order to prove the gang enhancement, the prosecution must prove, among other elements, that the defendants committed their crimes "for the benefit of, at the direction of, or in association with any criminal street gang." (Pen. Code, § 186.22, subd. (b)(1).) A "criminal street gang" has "as one of its primary activities the commission of one or more of" certain enumerated criminal acts. (Pen. Code, § 186.22, subd. (f); *People v. Sanchez* (2016) 63 Cal.4th 665, 698 (*Sanchez*).) The enumerated acts include assault with a deadly weapon, unlawful homicide, sales of controlled substances, and felony vandalism. (Pen. Code, § 186.22, subd. (e)(1), (3), (4) & (20).)

A gang's primary activities can be established through expert testimony. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Here, the prosecutor asked gang expert Officer Mercado, "What are the primary activities of Metro 13?" Officer Mercado responded: "They engage in assault with deadly weapons, sales of

⁵ Rengel has joined in each of Soltero's arguments, which we address in parts III through VI herein.

narcotics, murder, vandalism, theft." Mercardo was asked, "Is that felony vandalism?" He responded, "Yes." There were no objections to these questions or answers.

Soltero points out that Officer Mercado began his response to the prosecutor's question about Metro 13's "primary activities" by stating: "They *engage in* assault with deadly weapons [etc.]" (italics added)—not "their *primary activities* are assault with deadly weapons [etc.]" Soltero contends, therefore, that Officer Mercado's answer is insufficient evidence of Metro 13's *primary* activities. A similar argument was made in *People v. Margarejo* (2008) 162 Cal.App.4th 102. In that case, the prosecutor asked the gang expert, "'[W]hat are the *primary activities* of the Highland Park criminal street gang?[']" And the expert responded, "'Their activities range from simple vandalism and battery, and can extend all the way to murder. They also include consolidated weapons, carjackings, robberies and a lot of narcotic related offenses." (Id. at p. 107.) The defendant argued that the expert's testimony was insufficient to support the "primary activities" element because the expert "left out the word 'primary' in front of the word 'activities.'" (Ibid.) The Court of Appeal disagreed, stating that although the attorney's question is not evidence, "the question's wording typically is relevant to a reasonable interpretation of the witness's answer. Often it is vital to consider the question to understand anything about the answer, as with answers like 'yes.'" (*Ibid.*) The jury, the *Margarejo* court explained, "had ample reason to infer that [the expert's] answer implicitly incorporated the word 'primary' from the question. Ordinary human communication often is flowing and contextual. Jurors know this. Repetitive and stilted responses make up one kind of direct examination, but not the only kind. [The defendant's] objection here calls for an unreasonably restrictive interpretation of [the expert's] answer, which we respectfully decline." (*Ibid.*)

We agree with the *Margarejo* court's reasoning, which applies equally here. Officer's Mercado's response, beginning with "[t]hey engage in . . ." is substantively indistinguishable from the *Margarejo*'s expert's opening phrase, "their activities range from" Like the jury in *Margarejo*, the jury in this case would reasonably understand the expert's answer in the context of the prosecutor's question as referring to the gang's "primary activities." Officer Mercado's testimony, therefore, is sufficient to support the jury's finding that Metro 13's primary activities include the commission of one or more crimes enumerated in Penal Code section 186.22, subdivision (e).

Soltero also contends that there was an insufficient foundation for Officer Mercado's testimony regarding Metro 13's primary activities. This argument was not preserved for appeal, however, because neither Soltero nor Rengel objected to the challenged testimony on foundational or other grounds.

IV. Gang Expert's Reliance On Hearsay

Soltero contends that Officer Mercado improperly introduced testimonial hearsay when he testified to the basis for his opinions as to Metro 13's primary activities. Specifically, he challenges the following testimony by Officer Mercado.

⁶ The People contend that Soltero has forfeited this claim by failing to object on hearsay or Sixth Amendment grounds at trial. Even if forfeited, however, we may exercise our discretion to consider a forfeited argument that involves important constitutional or substantial rights. (*People v. McCullough* (2013) 56 Cal.4th 589, 593; *In re Sheena K.* (2007) 40 Cal.4th 875, 887.) We do so here. Because we address the merits of the argument, Soltero's argument that his counsel was ineffective for failing to object is moot.

"[Deputy District Attorney:] Now, you said that part of what you do is stay informed of and current on the customs and trends of the members of the gangs you're assigned to; is that right?

"[Officer Mercado:] Correct.

"[Deputy District Attorney:] How do you do that?

"[Officer Mercado:] The easiest way to do it is by talking to fellow gang members. They will disclose information about their own peers and gang members that includes locations where they reside, where they might have moved, true monikers that they used within the gang, activities that they might be involved in, or I also talk to neighboring cities, and we exchanged information as far as their contacts and our contacts.

"[Deputy District Attorney:] So you say part of what you do is talk to gang members; is that right?

"[Officer Mercado:] Yes.

"[Deputy District Attorney:] And are all your contacts with gang members, are they confrontational or custodial, or are some of them consensual?

"[\P] . . . [\P]

"[Officer Mercado:] A lot of them are consensual.

"[\P] . . . [\P]

"[Deputy District Attorney:] When you try to keep up with Metro 13, do you talk to members of the community?

"[Officer Mercado:] Yes.

"[Deputy District Attorney:] And do you ask them what's going on with the gang?

"[Officer Mercado:] Yes.

"[Deputy District Attorney:] Do they give you information sometimes?

"[Officer Mercado:] Yes. A lot of the community members are familiar with the gang members in their area, and they will disclose information."

Soltero relies on *Sanchez*, *supra*, 63 Cal.4th 665.7 In *Sanchez*, our Supreme Court recently disapproved of a line of authority that had allowed gang experts to recite testimonial hearsay as "basis" evidence; that is, evidence ostensibly offered not for the truth of the statements, but merely as matter the expert relied upon in forming his or her opinions. (*Id.* at p. 686, fn. 13.) As we explain below, the testimony Soltero challenges is not inadmissible under *Sanchez*.

In *Sanchez*, a gang expert opined that the defendant was a member of the Delhi gang and that his possession of drugs and a firearm benefitted the gang. (*Sanchez*, *supra*, 63 Cal.4th at p. 673.) In forming these opinions, the expert relied upon and testified to five specific instances in which the defendant had contact with police. (*Id.* at pp. 672-673.) The expert had never met the defendant and his knowledge of the five instances was based upon statements by others found in police reports, a "STEP notice" affidavit, and a field identification card, or "FI card." (*Id.* at p. 673.)

The *Sanchez* court explained that, traditionally, experts could "relate information acquired through their training and experience, even though that information may have been derived from conversations with others." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.) Thus, "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Id.* at p. 676.) Experts could not, however, relate

⁷ In his opening brief, Soltero acknowledged that his argument was not supported by "the prevailing law" at that time, but pointed to the Supreme Court's pending review in *Sanchez* and anticipated that the outcome in that case would support his position. By the time Soltero filed his reply brief, the Supreme Court had decided *Sanchez*, and he contends that it supports his argument. Because *Sanchez* was decided after the People filed their respondent's brief, we provided the People with an opportunity to file a supplemental brief to address *Sanchez*.

"case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried," and must generally be introduced through witnesses with personal knowledge of such facts. (*Ibid.*) The expert may opine about the *meaning* of case-specific facts by responding to hypothetical questions that assume their existence. (*Ibid.*)

Sanchez explained that this distinction between general background information and case-specific hearsay had "become blurred." (Sanchez, supra, 63 Cal.4th at p. 678.) As a result, courts were allowing experts to relate case-specific hearsay as "basis" evidence to support their opinions. (See, e.g., People v. Gardeley (1996) 14 Cal.4th 605, 619-620, disapproved in part in Sanchez, supra, 63 Cal.4th at p. 686, fn. 13.) Courts justified such testimony by stating that the jury could be instructed that the hearsay statements "'go only to the basis of [the expert's] opinion and should not be considered for their truth." (Sanchez, supra, 63 Cal.4th at p. 679, quoting People v. Montiel (1993) 5 Cal.4th 877, 919, disapproved in part in Sanchez, supra, at p. 686, fn. 13.) Sanchez rejected this justification based in part on recent United States Supreme Court cases interpreting the Sixth Amendment's confrontation clause. The proposition that case-specific out-of-court statements offered to support an expert's opinion "are not being admitted for their truth," the court concluded, "cannot logically be maintained" (id. at p. 686), and the "paradigm" that supported it was "no longer tenable" (id. at p. 679). The traditional distinction between general background information and case-specific facts, the Court declared, needed to be "restore[d]." (*Id.* at p. 685.)

Under this restored, Sixth Amendment-compliant distinction, "[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within

their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements. '[T]he confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.' [Citation.] Thus, only when a prosecution expert relies upon, and relates as true, a *testimonial* statement would the fact asserted as true have to be independently proven to satisfy the Sixth Amendment." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

In applying these principles, *Sanchez* held that the trial court erred in allowing the gang expert to testify about the defendant's prior contacts with police, about which the expert had no personal knowledge. The information in the police reports and the STEP notice, and possibly the information on the FI card, constituted inadmissible testimonial hearsay. (*Sanchez*, *supra*, 63 Cal.4th at pp. 696-700.) Because the error was not harmless beyond a reasonable doubt, the court reversed the true findings on the gang enhancement. (*Id.* at p. 700.)

Here, Soltero does not assert that Officer Mercado improperly recited information concerning Soltero in police reports or other documents of the kind the expert in *Sanchez* relied on. Instead, Soltero challenges Officer Mercado's testimony as to how he stayed informed about the "customs and trends of the members of the gangs" he follows, including Metro 13. Officer Mercado explained that he talks to fellow gang members and "to neighboring cities," with whom "we exchanged information as far as their contacts and our contacts." In order "to keep up with Metro 13," Officer Mercado testified that he talks "to members of the community" and asks "what's going on with the gang," and that

"[a] lot of the community members are familiar with the gang members in their area, and they will disclose information."

We reject Soltero's contention that this testimony disclosed any case-specific testimonial hearsay. Sanchez defined "case-specific facts" as "those [facts] relating to the particular events and participants alleged to have been involved in the case being tried." (Sanchez, supra, 63 Cal.4th at p. 676, italics added.) Here, the particular events involved in this case are the assault on Mora outside Burgos's house and the shooting incident at the Food 4 Less. The participants are Soltero, Rengel, and their female associates. The testimony Soltero challenges does not relate to either of these "particular events" or to the participants. To the contrary, the testimony is concerned more broadly with the gang's customs and trends, and what the gang was doing in general.

As *Sanchez* explains, an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at p. 685.) This includes describing to the jury "the type or source of the matter relied upon," so long as he does not present, "as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id.* at p. 686.) Here, the challenged testimony is within the latitude accorded experts under *Sanchez*. We therefore reject Soltero's argument.

V. Instruction And Alleged Prosecutorial Misconduct Regarding The Gang's Primary Activities.

Soltero argues that the trial court erred in instructing the jury as to the primary activities element of the gang enhancement and that the error was compounded by statements made by prosecutor during closing argument. Although the instructions permitted the jury to make the primary activities finding based on a factually insufficient theory, the error was harmless as we explain below.

The court instructed the jury that the prosecution must prove that the criminal street gang, i.e., Metro 13, "has as one or more of its primary activities the commission of assault with a deadly weapon, felony vandalism, or robbery." (Italics added.) The only evidence of Metro 13's primary activities, however, was Officer Mercado's testimony that the gang's primary activities are assault with deadly weapons, sales of narcotics, murder, felony vandalism, and theft; he did not mention robbery. Because there was no evidence that robbery was one of Metro 13's primary activities, Soltero argues that the court erred by permitting the jury to find that robbery was one of the gang's primary activities. We agree. As stated in *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*): "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*Id.* at p. 1129.)

The error is one of state law and governed by the *Watson* standard. (*Guiton*, *supra*, 4 Cal.4th at pp. 1129-1130.) Under this standard, we will affirm the judgment "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id.* at p. 1130.)

In addition to the factually insufficient theory of robbery, the jury was instructed that it could find the primary activities element satisfied based on either of two factually sufficient theories: assault with deadly weapons and felony vandalism. There is nothing in our record to suggest that the jury relied on the factually insufficient theory of robbery to the exclusion of the factually sufficient theories. We therefore reject Soltero's argument.

Soltero argues that the prosecutor's argument provides "an affirmative indication in the record that the verdict probably rested on a factually erroneous ground." We disagree. Regarding the primary activities element of the gang enhancement, the prosecutor stated merely: "[Metro 13's] primary activities are robberies, felony vandalism, and assault with deadly weapons." Although the prosecutor essentially restated the erroneous instruction, the statement does not increase the probability that the jury based its primary activities finding on robbery rather than either or both of the alternative crimes.

Soltero, however, argues that "the prosecutor told jurors that a single robbery committed by a single Metro 13 member in 2008 'prove[d]['] the primary activities 'element' of the gang enhancement." The argument, however, is based on a combination of what the prosecutor said about the gang's primary activities and what the prosecutor said immediately afterward regarding the requirement of proving two predicate offenses. (Pen. Code, § 186.22, subd. (e).) Specifically, after making the statement regarding the gang's primary activities (quoted above), the prosecutor stated: "And as we saw through this case and through the predicates, which were admitted into evidence, the certified documents, which show that members of Metro 13 committed murder and robbery. That element is proven." The prosecutor was referring to the evidence of two predicate offenses, namely, the murder committed by Metro 13 gang member James Piggee and the robbery committed by Metro 13 gang member Alejandro Perez. The prosecutor's comment about the murder and robbery was thus concerned solely with the predicate offenses element of the gang enhancement, not the primary

activities element. Soltero's argument thus misleadingly conflates the prosecutor's statements about distinct issues. Soltero then relies on this mischaracterization to assert that the prosecutor thereby lowered the People's burden of proof on the primary activities element and committed misconduct. Because the prosecutor did not make the statement that Soltero relies upon for these arguments, the arguments are without merit. Finally, because the prosecutor did not make the alleged statement and there was nothing objectionable about the statements the prosecutor did make, Soltero's counsel was not constitutionally deficient for failing to object to the statement.

VI. No Cumulative Error

Soltero contends that if any error does not require reversal when considered in isolation, the cumulative effect of the errors does. Here, the only errors we have identified are the court's instruction and the prosecutor's related comment regarding the factually insufficient theory of robbery as a primary activity along with the factually sufficient theories of assault with deadly weapons and felony vandalism. Because these errors do not implicate Soltero's federal constitutional rights, the issue is whether there is a reasonable probability that, in the absence of the errors, he would have obtained a more favorable result. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236-1237, citing *Watson*, *supra*, 46 Cal.2d at p. 836.)

Here, Officer Mercado testified that Metro 13's primary activities include assault with deadly weapons and felony vandalism, and there was no evidence contradicting that testimony. There is nothing in our record to suggest that the jury based its primary activities finding on the one theory (robbery) that is not supported by evidence and rejected each of two theories (assault

with deadly weapons and felony vandalism) for which the evidence was uncontradicted. It is, therefore, not reasonably probable that Soltero would have obtained a more favorable result if the court and the prosecutor omitted the erroneous references to robbery. Individually and cumulatively, the errors were, therefore, harmless.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.